Filed 6/7/19 P. v. Gonzalez CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ELMER GONZALEZ, Defendant and Appellant.	B291572 (Los Angeles County Super. Ct. No. BA460364)

APPEAL from a judgment of the Superior Court of Los Angeles County, Renee F. Korn, Judge. Affirmed.

William Paul Melcher, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Elmer Gonzalez of two counts of driving under the influence (DUI) of alcohol, and one count of fleeing a pursuing peace officer's motor vehicle while driving recklessly. During closing argument, defense counsel conceded Gonzalez was driving under the influence of alcohol. Counsel instead focused on contending Gonzalez did not intentionally act with a wanton disregard for safety when evading the police, and thus should be convicted of a lesser included offense on that count.

On appeal, Gonzalez argues his counsel's concession on the DUI counts was tantamount to a guilty plea, something to which Gonzalez never explicitly agreed, and thus error mandating reversal of the DUI convictions. Gonzalez also asks us to independently review the sealed transcript of the in camera hearing regarding his *Pitchess* motion for any error.

For the reasons set forth below, we find defense counsel's concession during closing argument was not equivalent to a guilty plea and did not require Gonzalez's explicit consent. We further find no abuse of discretion in the trial court's ruling on the *Pitchess* motion. Accordingly, we affirm.

FACTUAL BACKGROUND

A. Gonzalez's Evasion of Peace Officers

On August 20, 2017, Los Angeles Police Department (LAPD) Officers Michael Geitheim and Jayson Siller were assigned to DUI enforcement. The officers were dressed in full uniform and driving a marked police car. While on patrol, the

officers noticed a blue Jetta, driven by Gonzalez, whose brake lights were not functioning.

As the officers began following the Jetta, Gonzalez sped up until he was going about 10 miles over the speed limit. He then made a sudden U-turn so sharply it caused his car to tilt toward the passenger side. The officers decided to initiate a traffic stop and turned on the car's overhead light bar to alert Gonzalez to pull over. Gonzalez slowed down and pulled over to the curb between two cars, where there was no room for the officers to park behind him. As the officers were trying to pull out of traffic, Gonzalez started driving away. The officers assumed Gonzalez was looking for a more convenient spot to pull over and followed.

Gonzalez then made a sudden illegal U-turn. Before the officers had a chance to make a corresponding U-turn to follow him, Gonzalez made another illegal U-turn. After this 360-degree maneuver in the middle of the street, Gonzalez accelerated and began travelling against traffic, going westbound in the eastbound lanes. He then drove the wrong way down a one-way street.

Deciding it was too dangerous to continue pursuing Gonzalez by car (it was a Sunday afternoon and there were pedestrians as well as other cars around), the officers asked for helicopter assistance to track Gonzalez before losing sight of him. About thirty seconds later, the officers saw a large water geyser above a nearby intersection. As they approached the geyser, the officers saw a sheared off fire hydrant (the source of the water) and Gonzalez's blue Jetta on the other side of the intersection, crashed against a wrought iron fence about 10 feet beyond the curb.

Gonzalez got out his car and began running northbound. The officers drove in front of Gonzalez to try detaining him, but as they were getting out of their car, Gonzalez turned and ran the other way across traffic. The officers caught up to Gonzalez as he was running around an SUV. Both Gonzalez and Officer Siller fell down during the chase. By the time Gonzalez got up and started running again, Officer Geitheim had positioned himself in front of Gonzalez and was yelling at him to stop. As he neared Officer Geitheim, Gonzalez dove to the ground and was then handcuffed.[1]

The officers asked Gonzalez why he was running from them, and he responded he did not have a license. As they walked Gonzalez to the police car, the officers noticed he smelled of alcohol, had a flushed complexion, and had red and watery eyes. The officers asked if Gonzalez had been drinking, and he replied he had not. When they told him he smelled like alcohol, Gonzalez said he drank one beer.

The jury was shown footage from Officer Geitheim's body worn camera during trial, beginning from when the officers were in the police car initially trying to pull Gonzalez over and ending after they had apprehended him and asked the questions mentioned above, among a few others.

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[1] While Officer Gothiem testified Gonzalez dove to the ground in front of him, Officer Siller testified that as he was running behind Gonzalez he "assist[ed] him to the ground." There was no further evidence or argument about this discrepancy.

B. DUI Investigation

Upon arrival at the police station, Officer Siller conducted a DUI investigation. As a preliminary matter, he observed the same symptoms he had seen when the officers first detained Gonzalez—red watery eyes, the odor of alcohol emanating from defendant's person and breath, a flushed complexion, and an unsteady gait. Then, with Gonzalez's consent, Officer Siller conducted several sobriety tests to determine whether Gonzalez was in fact under the influence of alcohol.

He initially conducted three standardized tests. The first was a set of three eye exams, in which Gonzalez displayed all possible clues of intoxication the tests can elicit. The second was a walk-and-turn test, during which Gonzalez stepped off the line he was supposed to follow while stepping. He also turned incorrectly, looked up rather than at his feet, and had to use the wall and swing his arms out to keep himself from falling. According to Officer Siller, this conduct displayed two of the clues of intoxication the walk-and-turn test elicits. Lastly, Gonzalez displayed one of four possible clues during a one-leg stand test.

Officer Siller also conducted two additional sobriety tests which allow officers to evaluate impairment. One was the modified Romberg test, where individuals have to close their eyes, tilt their head back, and estimate the passage of 30 seconds. Gonzalez guessed 30 seconds had passed after only 18 seconds, which was outside the acceptable window of error. He additionally had a one-inch sway as he counted. Officer Siller also conducted the finger to nose test, during which Gonzalez hovered his finger to try to find his nose and generally touched it

with the pad of his finger rather than the tip, as he had been instructed to do.

After these tests, Officer Siller admonished Gonzalez of his option to take either a breath or blood test to measure his blood alcohol content (BAC). Gonzalez chose to take the breath test. He produced two breath samples. The first sample measured a 0.13 percent BAC and the second a 0.123 percent BAC. The People called a criminalist assigned to LAPD's forensic science division, who testified the breath machine Officer Siller used was working properly on August 20, 2017. The criminalist calculated a person of Gonzalez's height and weight would have had to drink about 5.6 standard drinks to get to a 0.12 percent BAC.

After obtaining the two breath samples, Officer Siller gave a *Miranda* warning to Gonzalez and asked him a series of questions. In response, Gonzalez denied drinking or driving, but then contradicted himself and said he had in fact been driving the blue car involved in the collision.

Based on Gonzalez's driving prior to the accident, the accident, his flight, his physical symptoms, and his performance on the standardized field sobriety tests, Officer Siller concluded Gonzalez was under the influence of alcohol.

PROCEDURAL BACKGROUND

A. Charges

Count one of the information charged Gonzalez with fleeing a pursuing peace officer's motor vehicle while driving recklessly,

in violation of Vehicle Code section 2800.2.[2] During trial, the jury was instructed it could alternatively find defendant guilty of the lesser offense of evading a peace officer.

Gonzalez was also charged with two counts of driving under the influence of alcohol. Count two alleged driving under the influence of alcohol within 10 years of two previous DUI's, in violation of section 23152, subdivision (a) and section 23546. Count three alleged driving with a 0.08 percent BAC within 10 years of two other DUI's, in violation of section 23152, subdivision (b) and section 23546.

Gonzalez was alleged to have previously been convicted of two DUI's, one count of evading a peace officer with willful or wanton disregard for safety, one count of attempted robbery, and one count of vandalism. Gonzalez waived his right to jury trial on his prior convictions, and the trial court bifurcated them.

Gonzalez pled not guilty to all charges and requested a jury trial.

B. *Pitchess* Motion

Prior to trial, Gonzalez filed a *Pitchess* motion[3], in which he requested disclosure of all complaints made against Officers Geitheim and Siller "relating to acts of violations of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure; false arrest, perjury, dishonesty, writing of false police reports, including the writing of false police reports to cover up the use of excessive force, planting of evidence, false or

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[2] Unless otherwise indicated, unspecified statutory references are to the Vehicle Code.

misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude . . . ."

The court granted the motion and allowed discovery of complaints made regarding use of force, credibility, and honesty. The court held an in camera hearing, where it found some complaints discoverable and ordered them to be turned over to the defense.

C. Closing Argument

During closing argument, Gonzalez's counsel argued as follows:

"[P]ay care[ful] attention to Jury Instruction 3517 which governs your deliberation, debate and verdict on the greater offense and lesser included of count 1.

"Essentially that is all that Elmer Gonzalez and I are asking of you during your deliberations. The judge has instructed you that anything attorneys say is not evidence. The fact that you might now be thinking is he conceding his client's guilt on counts 2 and 3? Yes, I am. But you shouldn't find Elmer Gonzalez guilty on counts 2 and 3 just because I say it's okay.

"You should find him guilty on counts 2 and 3 because, as to those two charges, the People presented ample evidence covering every possible detail, raising things that you probably never even considered yourselves including that he drove under the influence of alcohol with impaired judgment and in proving beyond a reasonable doubt that his blood alcohol content was above .08.

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3 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

"I would imagine that during the presentation of that evidence, you came to the conclusion that, yeah, he's probably guilty of that. And now that the case will be shortly put in your hands, you would think amongst yourself, yes, they proved that beyond a reasonable doubt. Every possible detail that you could consider was shown to you.

"Now by contrast, the judge gave you a series of instructions beginning with jury instruction 2181 that require the people to prove a number of things that show that Elmer Gonzalez is guilty beyond a reasonable doubt of the crime of evading a police officer in wanton disregard for safety. That includes the fact that in order to find Mr. Gonzalez guilty of that particular crime, that is, the greater crime alleged in count 1, the People would need to show that Mr. Gonzalez was aware that his actions[] presented a substantial and unjustifiable risk of harm, and that he intentionally ignored that risk.

"Now you heard copious evidence over the course of two different days about how alcohol affects the human mind [and h]ow it impairs our judgment, and I think it's then fair to ask, if his judgment was indeed that impaired, if he had drunk enough to slur his words, have a flushed face, and be under the influence, as the People have alleged and quite frankly proved, then the question then becomes, first off, did he have the necessary intent to drive in that manner which is to say did he intentionally[,] take[ ] the risk his driving was supposedly driving [*sic*], did he choose to ignore that risk?"

Later, Gonzalez's counsel reiterated: "Now you have ample proof for every possible detail on the DUI. I do not believe you have that level of proof to prove those traffic violations."

Finally, Gonzalez's counsel concluded by arguing the following:

"We believe that, when you look at everything the People need to prove beyond a reasonable doubt, you will find that they didn't prove the more serious charge of evading arrest with a disregard for safety. They have proved that he drove and evaded the police officer as the lesser offense. They have proved he drove under the influence of alcohol, and that his blood alcohol content was above .08, but they did not prove that he drove with a wanton disregard for safety. And on that count, we ask you find him not guilty."

In his rebuttal, the prosecutor said:

"Because [defense counsel] in his closing statement really only focused on count 1 and as he said conceded count 2 and 3, I agree with him it's still your duty to evaluate those counts, but I presented in my first closing argument the different factors that I believe you should find him guilty based on, and you can independently evaluate that yourself."

D. Verdict and Sentencing

The jury convicted defendant as charged. Defendant admitted a prior serious felony conviction and two prior qualifying drunk driving convictions. He was sentenced to state prison for four years on count one, and the sentence on count two was stayed pursuant to Penal Code section 654. As to count three, defendant was placed on summary probation for five years and ordered to serve 120 days in any facility. Defendant timely appealed.

DISCUSSION

A. Defense Counsel's Concession During Argument Was Not a Guilty Plea Nor Did It Require Gonzalez's Explicit Consent

Gonzalez argues his counsel's concession on the DUI counts was tantamount to a guilty plea to which he never agreed. "A guilty plea . . . is an event of signal significance in a criminal proceeding. . . . Accordingly, counsel lacks authority to consent to a guilty plea on a client's behalf . . . ." (*Florida v. Nixon* (2004) 543 U.S. 175, 187 [125 S.Ct. 551] (*Nixon*).) "[I]n the event of a guilty plea or other conduct tantamount to a plea, 'the record must demonstrate that the defendant voluntarily and intelligently waived his constitutional trial rights.' " (*People v. Lopez* (2019) 31 Cal.App.5th 55, 63 (*Lopez*).)

In *People v. Cain* (1995) 10 Cal.4th 1, our Supreme Court held "trial counsel's decision not to contest, and even expressly to concede, guilt on one or more charges . . . is not tantamount to a guilty plea." (*Cain*, *supra*, 10 Cal.4th at p. 30.) The United States Supreme Court later agreed with this holding of *Cain*.

(See *Nixon*, *supra*, 543 U.S. 175.) Gonzalez argues two more recent cases—*People v. Farwell* (2018) 5 Cal.5th 295 (*Farwell*) and *McCoy v. Louisiana* (2018) ___ U.S. ___, [138 S.Ct. 1500] (*McCoy*) found concessions of the type his counsel made tantamount to a guilty plea, and required his explicit consent. As the record here does not contain evidence of such explicit consent, Gonzalez argues his DUI convictions must be reversed.

In *Farwell*, the parties entered into a stipulation encompassing all elements of one of the charged counts, and the trial court instructed the jury it had to accept those stipulated facts as true. (*Farwell*, *supra*, 5 Cal.5th at p. 298—299.) The court did not advise the defendant of the constitutional rights implicated by a guilty plea or the stipulation. Nor did it solicit a personal waiver of those rights. (*Id*. at p. 299.) Our Supreme Court held the stipulation was tantamount to a guilty plea because it "conclusively establish[ed] all of the elements of the misdemeanor, [which] ma[d]e the guilty plea a foregone conclusion." (*Id*. at p. 308.) Thus, although there was still a jury, its role was limited—if the jury followed the court's instructions, which a jury is presumed to do, it was mandated to find defendant guilty on that count. (*Id*. at p. 300.)

In *McCoy*, the defendant in a death penalty trial explicitly and repeatedly told counsel not to concede his guilt on murder charges, maintaining he was innocent. (138 S.Ct. at p. 1506.) There was no question counsel knew of defendant's " 'complet[e] oppos[ition] to [counsel's] telling the jury that [defendant] was guilty of killing' " three people. (*Ibid*.) Even so, during his opening statement and closing argument, in order to maintain credibility with the jury for the penalty phase, counsel told the jury that defendant was undoubtedly guilty and that he had

taken "[the] burden off of [the prosecutor]." (*Id.* at p.1507.) The United States Supreme Court held that when a defendant "vociferously insist[s] that he did not engage in the charged acts and adamantly object[s] to any admission of guilt," defense counsel is prohibited from admitting defendant's guilt during the guilt phase of trial. (*Id.* at p. 1505.) "When a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." (*Id.* at p. 1509; U.S. Const. 6th Amend.)

In *Lopez*, our colleagues in Division Four of this District rejected the very argument made by Gonzalez based on *Farwell* and *McCoy*. (*Lopez*, *supra*, 31 Cal.App.5th 55.) *Lopez* found *Farwell* distinguishable because, as is the case here, "there was no stipulation admitting the elements of the [charges] as an evidentiary matter. Instead, the jury was instructed that the prosecution had to prove guilt on all counts beyond a reasonable doubt and that statements by counsel were not evidence. Thus, the prosecution was still required to present 'competent, admissible evidence establishing the essential elements' of each charge"—something it would not have had to do had the defendant pled guilty. (*Lopez* at p. 64.)

Lopez explained courts have repeatedly distinguished between circumstances concerning a concession made during closing argument and a guilty plea or its equivalent. (31 Cal.App.5th at p. 65.) The rationale of the requirement that the record demonstrate the defendant voluntarily and intelligently waived his or her constitutional trial rights is to ensure a defendant knows of and voluntarily waives three specified rights surrendered by a guilty plea: the right to a jury trial, the

opportunity to cross-examine the witnesses against him or her, and the right against self-incrimination. (*Ibid*.) There is no surrender of these rights " 'when the defendant undergoes—and thereby exercises his right to—a jury trial and has the opportunity to cross-examine the witnesses against him and to refuse to incriminate himself.' " (*Ibid*.)

Here, as in *Lopez*, Gonzalez retained the rights accorded a defendant in a criminal trial despite his counsel's concession. (31 Cal.App.5th at p. 65; accord, *Nixon*, *supra*, 543 U.S. at p. 188.) Gonzalez had a jury trial, had the opportunity to cross-examine the witnesses against him, and refused to incriminate himself. His counsel's concession of his guilt as to the DUI charges did not take any of these rights away, "did not change the burden of proof, [and] did [not] limit the scope of the jury's role." (*Lopez*, *supra*, at p. 64.) Accordingly, defense counsel's concession during closing argument was not the equivalent of a guilty plea.

Lopez found *McCoy* inapposite on the basis that the defendant in *McCoy* explicitly and repeatedly told counsel not to concede his guilt, maintaining he was innocent. (*Lopez*, *supra*, 31 Cal.App.5th at pp. 65—66.) While the *McCoy* court emphasized a defendant's right to set his or her case objectives, it also noted that counsel provides assistance on how best to achieve those objectives, including "mak[ing] decisions such as 'what arguments to pursue . . . .' " (*McCoy*, *supra*, 138 S.Ct. at p. 1508.) Part of counsel's strategy on attaining the best outcome, if not explicitly opposed by the client, can include conceding guilt as to some charges in order to maintain credibility with the jury to contest other charges. (See, e.g., *People v. Freeman* (1994) 8 Cal.4th 450, 498 ["Recognizing the importance of maintaining credibility before the jury, we have repeatedly rejected claims

that counsel was ineffective in conceding various degrees of guilt."].)

Here, there is nothing in the record suggesting Gonzalez disagreed with his counsel's trial strategy of conceding guilt as to the DUI charges.[4] Nor was the concession ill-informed or gratuitous. As indicated by what happened at sentencing, count one was likely the most serious charge in terms of potential prison time. The defense strategy as to count one essentially required the concession counsel made, as the defense argument was that Gonzalez was too intoxicated to form the specific intent required for a reckless evasion of a pursuing peace officer charge. The suggestion that, in the absence of explicit direction from defendant, counsel was required to argue Gonzalez was not under the influence of alcohol when driving, while at the same time arguing Gonzalez was too much under the influence of alcohol while driving to have the specific intent to evade a peace officer with a wanton disregard for safety, ignores the realities of trial practice and jurors adverse reaction to such irreconcilable positions. (Cf. *Nixon*, *supra*, 543 U.S. at p. 191 [noting need for effective defense counsel to avoid counterproductive course of action by presenting inconsistent defenses].)

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[4] The record indicates Gonzalez and his counsel conferred during trial. Defense counsel told the court, "Mr. Gonzalez and I have spoken at various times during pendency of this case . . . ." During closing argument, defense counsel said "[P]ay care[ful] attention to Jury Instruction 3517 which governs your deliberation, debate and verdict on the greater offense and lesser included of count 1. Essentially that is all that Elmer Gonzalez and I are asking of you during your deliberations." If Gonzalez disagreed with any these statements, he had ample opportunity to speak up.

As *Lopez* explains, there is no authority "allowing extension of *McCoy*'s holding to a situation where the defendant does not expressly disagree with a decision relating to his right to control the objective of his defense." (*Lopez*, *supra*, 31 Cal.App.5th at p. 66.) The record before us does not indicate Gonzalez disagreed (much less expressly disagreed) with counsel's defense strategy, and *McCoy* is therefore inapplicable. (*Ibid.*; see also *People v. Franks* (2019) ___ Cal.App.5th ___, 2019 WL 2281530, *4 [*McCoy* inapplicable where "nothing in the record indicates that [defendant] ever made it clear to his counsel (or the court) that the objective of his defense was to maintain innocence, or that he voiced 'intransigent objection'—or any opposition—to his lawyer's defense strategy."].)

B. *Pitchess* Hearing

Gonzalez asks for, and the People do not object to, an independent review of the sealed transcript of the in camera *Pitchess* hearing and the trial court's determination of what needed to be produced in response to defendant's discovery request. We review the trial court's determination for an abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220–1221.)

The trial court complied with the hearing's procedural requirements, and the record is sufficiently detailed to review the trial court's exercise of its discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229–1230, fn. 4; *People v. Wycoff* (2008) 164 Cal.App.4th 410, 414–415.) There was no further discoverable information beyond the two relevant complaints disclosed that would have had a reasonable probability of changing the outcome

of the trial. (See *People v. Gaines* (2009) 46 Cal.4th 172, 182—183.) We accordingly find no abuse of discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

CHANEY, Acting P. J.

BENDIX, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.